

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ENCEP NURJAMAN; MOHAMMAD NAZIR BIN LEP; MOHAMMED FARIK BIN AMIN	AE 0002.046 (AMI) Mr. Bin Amin’s Reply to the Government’s Response to Mr. Bin Amin’s Motion For a Hearing with Witnesses to Determine the Sufficiency of the 30 and 31 August Proceedings 18 January 2022
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1. **Timeliness.** This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. **Relief Sought.**¹ Mr. Mohammed Farik Bin Amin respectfully requests the Commission order a hearing with witnesses to determine the sufficiency of the 30 and 31 August proceedings, as required by law.²

3. **Burden of Proof.** As the moving party, Mr. Bin Amin bears the burden of proof and persuasion.

4. **Facts.** Based on the government’s representations in AE 0002.045 as well as the surrounding circumstances, Mr. Bin Amin submits the following:

a. In AE 0002.045, the prosecution admits that during the arraignment the government became aware that IN1 “was experiencing some difficulty with the interpretation.”³

¹ Given current resources, Mr. Bin Amin’s legal team cannot provide effective assistance of counsel within the meaning of the Sixth Amendment. Further, pursuant to the American Bar Association Criminal Justice Standards for the Defense Function Standard 4-1.8 (c) Appropriate Workload, the undersigned counsel hereby notifies the court the workload “exceeds the appropriate professional capacity” as currently staffed and resourced. Counsel provides this information to the Court as part of their ethical duty.

² *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985).

³ AE 0002.045 (GOV) at 2.

b. Despite this contemporaneous awareness, despite the repeated objections of defense counsel for Mr. Bin Lep and Mr. Bin Amin, *and despite being an officer of the court*, the prosecution failed to share this knowledge with the Trial Judge or the defense.

c. At some unknown and unspecified time during the arraignment, (perhaps during the portion wherein IN1 was demonstrably reading from a document provided by the prosecution, rather than actually interpreting what was being said) P/I told the prosecution IN1's interpretation "was improving and intelligible."

d. Subsequent to the arraignment, the prosecution was again informed by their interpreters the interpretation of the proceedings was "flawed and incomplete."

e. In spite of all of the information the prosecution has to conclude otherwise, the prosecution assures the court that "the arraignment portion of the proceedings was accurately interpreted."

5. Law and Argument.

a. Mr. Bin Amin Has a Right to Understand the Proceedings Against Him.

The government asserts the Military Commissions Act of 2009 affords Mr. Bin Amin with "extensive protections" including "many" of the rights of the Uniform Code of Military Justice.⁴ Without conceding the extent to which *United States v. Cirrincione* is applicable, Mr. Bin Amin agrees with the government that he "must be able to understand the proceedings."⁵ Credible evidence has been presented by both the Defense and prosecution indicating at a minimum, that there is a question as to whether Mr. Bin Amin was able to understand the proceedings. The government asserts *some* of the proceedings were (miraculously) interpreted accurately, and this

⁴ AE 0002.045 (GOV) at 4.

⁵ AE 0002.045 (GOV) at 5.

is sufficient. However, the government does not provide context to their assertions. For this reason alone, the Court should order a hearing with witnesses to determine the answer to the question, “Was Mr. Bin Amin provided with an interpreter who ensured he understood the proceedings?” If the answer is “no,” then Mr. Bin Amin must be provided a new arraignment.

The court cannot simply take the government’s word that the arraignment interpretation was done accurately. Rather, the court has an obligation to seek the truth, which can only be ascertained by a hearing with witnesses, subject to both direct and cross examination. By refusing to disclose to the court the fact that the interpreter was “experiencing some difficulty” during proceedings, the government demonstrates that they are willing to withhold facts that are inconvenient. Moreover, this conduct makes it clear that they do not care whether Mr. Bin Amin understood the proceedings. A hearing with witnesses is the only way to ensure the facts are adequately established. “Any institution that wields the government’s power to deny life and liberty must do so fairly, as the public’s ultimate objective is not in securing a conviction but in achieving a just outcome.”⁶ To proceed without further exploration would be unfair and unjust.

b. Mr. Bin Amin Has Demonstrated a Change in Material Facts, and a Hearing to Explore These Facts is Necessary to Prevent a Manifest Injustice.

The government argues “Mr. Bin Amin’s motion is essentially a motion for reconsideration of the Commission’s ruling in AE 0002.043. The granting of such a request is in the Military Judge’s discretion and is generally limited to a showing of a change in material facts or controlling law, or correct a clear error, or prevent a manifest injustice.”⁷ There can be no doubt

⁶ *In Re: Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019)

⁷ AE 0002.045 (GOV) at 7.

that there is a “change in material facts,” in that there is new information previously not before the court. When this Commission found, during the arraignment, that the interpretation was sufficient, he did so based on questions and answers of IN1 and the accused in this case. Of particular note, the Commission did not have the benefit of another Malay speaker’s opinion of the translation. The following new and material facts are now before the Commission.

1) The prosecution presents new facts in its response, AE 0002.045 (GOV).

In their response, the prosecution admits that they had information about the interpreters that has remained undisclosed until their response in AE 0002.045. While the prosecution’s interpreter was present *and* had informed the government of his concerns that IN1 was “experiencing difficulty,” the prosecution remained silent and failed to candidly inform the court of this critical information.

This new information, obviously, put the trial court at a distinct disadvantage and also presents new facts before the Commission. The government then indicates some unnamed and unidentified interpreters have assessed “the arraignment portion of the proceedings was accurately interpreted.” The knowledge and background of these interpreters is uncertain. What is certain, however, is that it is not up to the government’s interpreters to determine if the arraignment portion was sufficiently translated. That is the job of the judge, after a full review of the facts. Perhaps, had the government been forthcoming with their undisputed knowledge that Mr. Bin Amin’s assertions of having difficulty understanding the interpreter were legitimate, the trial court may have come to a different conclusion.

2) A review of the Commission Interpreter translation reveals a substantially flawed translation throughout the proceedings.

Since the time of the Commission's decision on the sufficiency of the arraignment, the defense has had opportunity to review the tapes. The defense has provided the court with three affidavits, two from defense Malay linguists, and one from defense counsel who spoke with the government's chosen linguist, all of whom state the translation was insufficient.

The government is encouraging this court to abdicate its responsibility to be the arbiter of facts and truth, by simply taking the government at their word. That is not how justice is supposed to work. Rather than allowing one litigant to "run the table," as it were, it is the job of the judge to call balls and strikes. This can only be accomplished when the facts are known to the judge in full. A hearing is absolutely necessary to determine how "flawed" and how "incomplete" the interpretation of the proceedings was. The court must determine whether, as the government asserts, the "arraignment portion" was, indeed, accurately interpreted.⁸ "Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."⁹

6. Conclusion. Given the new facts and circumstances now presented to the Court, a hearing with witnesses is necessary to determine the sufficiency of the arraignment, whether IN1 provided interpretation services such that Mr. Bin Amin had a full understanding of the

⁸ One might also be interested in pursuing a line of questioning about what miracle took place, such that IN1, who could not, even according to the government, provide an accurate and complete interpretation of the first part of the proceedings, could suddenly become skilled in the language such that another portion, rife with legal concepts, was, indeed, accurate and complete.

⁹ *Brady v. Maryland*, 373 US 83, 87 (1963).

proceedings. If Mr. Bin Amin was not provided with a competent interpreter, proceeding without a proper arraignment is a manifest injustice.

7. **Oral Argument.** Mr. Bin Amin continues to request oral argument.
8. **Witnesses and Evidence.** Previously listed and incorporated by reference.
9. **Attachments.**
 - a. Certificate of Service, dated 18 January 2022.

Respectfully submitted,
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CHRISTINE A. FUNK
GS-15
Detailed Civilian Defense Counsel

//s//
CHANTELL M. HIGGINS
Lieutenant Colonel, USMC
Detailed Defense Counsel

//s//
MARK P. DENBEAUX
Pro Bono
Detailed Civilian Defense Counsel

ATTACHMENT A

Certificate of Service

I certify that on **18 January 2022**, I filed **AE 0002.046 (AMI) Mr. Bin Amin's Reply to the Government's Response to Mr. Bin Amin's Motion For a Hearing with Witnesses to Determine the Sufficiency of the 30 and 31 August Proceedings** with the Office of the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by email.

//s//

CHRISTINE A. FUNK
Detailed Civilian Defense Counsel